Supreme Court, U.S.
FILED
MAY 28 1992
OFFICE OF THE CLERK

No. 91-1745

In The
Supreme Court of the United States
October Term, 1991

ELKS, NATIONAL FOUNDATION, A LEGAL ENTITY, ET AL.,

Petitioner,

v.

FRED J. WEBER, ET AL.,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

JUDGES' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Allen B. Chronister
Counsel of Record
208 North Montana
Helena, MT 59601
(406) 449- 3691

QUESTIONS PRESENTED

1. Is a decision of the Montana Supreme Court subject to direct review by a United States District Court?

2. Is it proper to award attorney fees and costs to parties who demonstrate not only that the court in which the action against them was brought lacks subject matter jurisdiction, but also that the substance of the action is wholly devoid of legal merit?

PARTIES TO THE PROCEEDING

Petitioners have identified the parties as set forth in the caption used in the courts below. Among the respondents, Montana Supreme Court Justice Russell C. McDonough is misidentified as "Russell C. McDonald." [Petition at 3]

Additionally, named respondent The Honorable Frank I. Haswell is now deceased. Normally, a deceased public officer's successor is automatically substituted as a party in an appeal. Supreme Court Rule 35.3. Here, no successor exists to Mr. Haswell, a retired Chief Justice of the Montana Supreme Court who sat by designation on the panel that heard the matter. Petitioners brought this action against the members of that panel, rather than the Court as an entity.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT SUMMARY 4

ARGUMENT 6

I. As A Matter Of Settled Law, The Federal Courts Lacked Jurisdiction To Review Montana's Judicial System 6

II. Attorney Fees And Costs Were Awarded Properly In Light Of Petitioners' Abuse Of Judicial Process 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES	PAGE
Continental Oil Co. v. Elks National Foundation, 767 P.2d 1324 (1989)	9
District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983)	13,14
Elks National Foundation v. Weber, 942 F.2d 1480 (9th Cir. 1991)	3,14, 15
Reynolds v. State of Georgia, 640 F.2d 702 (5th Cir. 1981)	12,13
Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986)	14
Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923)	12,13
STATUTES	
28 U.S. C. § 1257(a)	13
COURT RULES	
Rule 42.2, Rules of the Supreme Court of the United States	6,17
Rule 38, Federal Rules of Appellate Procedure	16

STATEMENT OF THE CASE

Petitioners' Statement of the Case is inaccurate and incomplete. The Statement of the Case contained in the Brief in Opposition submitted by the other respondents, Continental Oil Company, Shell Oil Company and Robert Schwinn, serves to set the record straight.

Respondents Montana Supreme Court Chief Justice Jean A. Turnage and Associate Justices John C. Harrision, Fred J. Weber, William E. Hunt and Russell C. McDonough and Temporary Associate Justice Leonard H. Langen, and Montana District Court Judges Joe L. Hegel and Kenneth R. Wilson (collectively the Montana judges) would add that they asserted various defenses when they were brought into this action by petitioners. In their answer to the complaint, they asserted the lack of subject matter jurisdiction, that the claims were barred by the Eleventh Amendment to the United States Constitution and by *res judicata,* that

petitioners were estopped from claiming a due process violation, and that abstention principles precluded relief. The judges moved for summary judgment on each of these grounds.

In granting the Montana judges' motion for summary judgment, Chief United States District Judge Battin initially did not touch on any of these grounds; he relied on petitioners' failure to file a brief that was responsive to the motion. [Order dated October 12, 1989; Pet. Appx. at 47-49.] In a subsequent order, Judge Battin focused on considerations of subject matter jurisdiction, concluding that his court lacked jurisdiction over petitioners' transparent attempt to appeal a Montana Supreme Court decision to Federal District Court. [Order of November 17, 1989; Pet. Appx. at 33-46.]

It should be noted also that in his order of October 12, 1989, Judge Battin declined to award attorney fees to respondents, without comment, although all of them had requested such an award.

Petitioners then asked the District Court to amend that order, insisting among other things that the merits should be reached. This elicited another round of briefs with objections from respondents. Judge Battin revisited the issue in his order of November 17, 1989, and ruled that attorney fees should be awarded because the action was groundless.

The Ninth Circuit agreed that the Federal District Court lacked subject matter jurisdiction. *Elks National Foundation v. Weber*, 942 F.2d 1480, 1485 (9th Cir. 1991). [Pet. Appx. at 10-13.] That Court went on to examine the merits of petitioners' claims to the extent necessary to determine whether the lower court had abused its discretion in awarding attorney fees, and whether fees should be awarded on appeal. Concluding that there was virtually no substantive basis for the Federal Court action, the Court upheld the District Court's award and awarded attorney fees and costs on appeal as well. *Id.*, 942 F.2d

at 1486. [Pet. Appx. at 14-16.]. In its unpublished order setting the amount to be awarded, [Pet. Appx. at 18, 19] the Court of Appeals stated it "decided to award costs and a portion of the claimed fees as a deterrent to subsequent abuses, pursuant to Federal Rules of Appellate Procedure, Rule 38."

ARGUMENT SUMMARY

The other defendants and respondents in the court below, Continental Oil Company, Shell Oil Company, and Robert P. Schwinn, are submitting a separate Joint Brief in Opposition to the Petition. The justices of the Supreme Court of Montana and judges of Montana's Sixteenth Judicial District Court concur with the points and arguments contained in the other respondents' Joint Brief in Opposition, and add their supplemental points and arguments to emphasize the inappropriateness of petitioners' attempt to invoke the jurisdiction of the United States District Court in this matter.

As the Court of Appeals for the Ninth Circuit noted in the opinion below, petitioners' Federal Court action "follows long and colorful litigation in Montana state courts concerning ownership of the working interest in an oil and gas lease in the N1/2 of the NW1/4 of section 8, T7N, R60E, Fallon County, Montana." [Pet. Appx. at 5.] The Court of Appeals, like the United States District Court in the first instance, correctly viewed the Federal Court action as a misguided attempt to continue the state court litigation. Neither the Court of Appeals nor the District Court accepted petitioners' superficial claim of having been deprived of property without due process. This Federal Court action represents nothing more or less than an attempt to have a United States District Court conduct appellate review of a decision of the Montana Supreme Court.

Petitioners have recast their claim in seeking a writ of certiorari. That approach is unavailing because, as the Ninth Circuit recognized, petitioners

in fact received all the process they were due in Montana courts. Petitioners' relentless refusal to acknowledge that fact, coupled with their failure to muster colorable authority for their stated legal theories, brought on the sanctions imposed by the Federal District Court and the Court of Appeals. Petitioners apparently have learned nothing from the lower courts' admonitions, and the Montana judges join with the other respondents in asking this Court to award "just damages and single or double costs" pursuant to Rule 42.2 of the Rules of the Supreme Court of the United States.

ARGUMENT

I. As A Matter Of Settled Law, The Federal Courts Lacked Jurisdiction To Review Montana's Judicial System.

There is nothing unsettled or novel about the legal principles that have been invoked by the Federal Courts to resolve this matter. The complicating factor was described by Judge Battin in

his Memorandum and Order of November 17, 1989, where he remarked, "The procedural posture of this case has been unnecessarily complicated by [Petitioners'] failure to properly distinguish between and address the issues raised by the parties." [Pet. Appx. at 39.] Petitioners are continuing to complicate the procedural posture of this case. Their first "Question Presented" [Pet. at i], is barely intelligible. It seems to refer less to the claim they made in Montana courts and lower Federal Courts, that their title should be measured by a number of documents read together than to the claim they are asserting now, that their title should be measured by a particular document.

In paragraph XIX of petitioners' Federal Court complaint [Pet. Appx. at 241], they acknowledged: "[Petitioners'] claims to title are based, primarily, on a construction of the McDonald assignment according to the usual rules of construction and agreements made after the [1962] assignment by defendant

Continental Oil Company and the McDonald assignees." This acknowledgment mirrored the partial summary judgment ruling petitioners obtained in Montana's Sixteenth Judicial District Court: "This ratification . . . dated May 24, 1962 . . . is the principal source of dispute in these proceedings." [Pet. Appx. at 101.]

The Montana District Court had gone on to rule that the 1962 document was ambiguous, and then turned to a notion of the parties' intent, finding that "[i]t was the intent and understanding of both parties . . . that by the ratification McDonald was conveying 1/2 of whatever he owned in the lease." [Pet. Appx. at 101- 02.] Based on that finding, the Montana district court had concluded, "[T]he parties did not not intend at the time of the conveyance [i.e., 1962] that McDonald convey more than 1/2 of what he owned." [Pet. Appx. at 115.]

That ruling resulted in the Montana Supreme Court's acceptance of supervisory control,

consideration of briefs and oral argument, and ultimate decision adjusting the competing title claims of petitioners and Continental. *Continental Oil Co. v. Elks National Foundation*, 767 P.2d 1324 (1989). As that Court observed, "[Petitioners] argue here, as they did before the District Court, that that the ratification is ambiguous so that a court must look beyond the four corners of the document to interpret it. The Court was not persuaded by that argument in *Gunnip*, nor is it now." [Pet. Appx. at 130.] After quoting a passage from its prior opinion which catalogued the defenses McDonald's assignees might assert to avoid the effect of the 1962 ratification, the Montana Supreme Court reiterated, "Then, as now, we found no ambiguity in the ratification agreement." [Pet. Appx. at 131.]

Again, petitioners acknowledged in their federal court complaint that the 1962 ratification was pivotal. While the Montana District Court had accepted that assertion, and also petitioners'

argument that the 1962 ratification was ambiguous, the Montana Supreme Court had agreed only with the former conclusion.[1] Nor could the Montana Supreme Court agree with the District Court's finding that the 1964 letter and division order supplied evidence of the parties' intent in 1962 [Pet. Appx. at 111], or supported estoppel against Continental. [Pet. Appx. at 113.] Rather, the Montana Supreme Court noted, "We have considered all materials and evidence submitted by [Petitioners], including copies of certain oil division orders and correspondence between Continental and [Petitioners'] attorney. * * * However, we find nothing to indicate that Continental has relinquished its claim to any portion of one half of the working interest in the N1/2NW1/4." [Pet. Appx. at 132.]

---

[1] Petitioners assert that the Court of Appeals was confused about the Montana Supreme Court's decision. Pet. at 14, n.8, but the "confusing language" to which they refer appears only in the publisher's summary of the Ninth Circuit's opinion. That Court's opinion recites the procedural history of the case with total accuracy.

The Ninth Circuit recognized that petitioners' Federal Court complaint had centered on the Montana Supreme Court's interpretations of the 1962 ratification and the 1964 letter and division order. The Court of Appeals' statement that "[t]he Montana Supreme Court did hear and decide the issue of the ambiguity of the ratification agreement," which petitioners now characterize as reflecting a "misunderstanding" of petitioners' position [Pet. Appx. at 29-31], fits the issues petitioners themselves had framed in their action.

Petitioners now assert that the 1964 letter, which they describe in their petition as a "separate, subsequent contract" [Pet. at 7, 8] is the basis for their title claim to get around the Ninth Circuit's holding that Montana courts had considered and decided issues bearing on the disputed title. This shift in emphasis shows that petitioners will stop at nothing to obtain one further opportunity to have their title claim confirmed judicially. It also bears out the

wisdom of the courts below in seeing through petitioners' attempt to invent a frivolous federal claim under Section 1983 to achieve that end.

There is ample authority for rejecting misguided Section 1983 claims. In *Reynolds v. State of Georgia*, 640 F.2d 702 (5th Cir. 1981), for example, a disappointed state court litigant had invoked Section 1983 in an action to recover real property in Georgia. She sought to set aside the Georgia Court's judgment, to enjoin state officers, and to obtain a declaration of her rights and recover damages. The Court of Appeals affirmed dismissal of the action for lack of subject matter jurisdiction, and appended the lower court's opinion to its own. One part of the lower court's opinion, which quotes a passage from *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923), is particularly apt:

> Despite plaintiff's portrayal of her dissatisfaction with the Georgia Court's decisions as a distinct injury, it is manifest from the prayers of her

> complaint that she seeks essentially an appellate review of those decisions. "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause . . . ." *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 175, 2 L. Ed. 60 (1803), "[T]o reverse or modify [a] judgment . . . would be an exercise of appellate jurisdiction."

Rooker, supra, 263 U.S. at 416, 44 S. Ct. at 150.

Judge Battin cited *Reynolds* in his November 17, 1989, decision. [Pet. Appx. at 42.] The action before him was remarkably similar to *Reynolds;* as in that case the fundamental request was for revision and correction of a state court judgment, and relitigation of the underlying claims in Federal Court.

The difference between a request for review of a state court judgment and a request for vindication of Constitutional and civil rights was not lost on the Ninth Circuit. That Court's opening references to 28 U. S. C. § 1257(a), which provides for United States Supreme Court review of state court judgments, and *District of Columbia Court of Appeals v. Feldman,*

460 U.S. 462 (1983), which reinforces the statutory constraint on federal court appellate jurisdiction, went to the heart of the matter.

The one case petitioners relied on, *Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *vacated*, 477 U.S. 902 (1986), did not advance petitioners' spurious jurisdictional claims at all, as the Ninth Circuit noted. ("[Petitioners'] reliance on that case is both misplaced and ill-advised." *Elks National Foundation v. Weber, supra*, 942 F.2d at 1483; [Pet. Appx. at 10]).

There is nothing novel in the Court of Appeals' handling of this case. The lack of federal court jurisdiction was, and is, a matter of settled law.

II. Attorney Fees And Costs Were Awarded Properly In Light Of Petitioners' Abuse Of Judicial Process.

The Court of Appeals did not stop with its conclusion that petitioners had tried to obtain direct review of the Montana Courts, but went on to assess

the substantive basis for such a review. The Court was taking pains to ensure that sanctions imposed by the District Court were appropriate, and to explain the basis for sanctions on appeal.

The Court of Appeals found readily that petitioners had received due process in the Montana judicial system, noting:

> Due process requires an opportunity to be heard in a meaningful manner at a meaningful time. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), *rev'd on other grounds*, 474 U.S. 327 (1985). It is clear beyond argument that the McDonald assignees [Petitioners] were afforded a meaningful opportunity to be heard before the Supreme Court of Montana on the purely legal issue of the facial ambiguity of the ratification agreement.

Elks National Foundation v. Weber, supra, 942 F.2d at 1486; [Pet. Appx. at 15].

This finding led to the conclusion that petitioners' "substantive position is devoid of legal merit." *Elks National Foundation v. Weber, supra,*

942 F.2d at 1486; [Pet. Appx. at 16]. Petitioners cannot get around this ruling by accusing the Ninth Circuit of having "misunderstood" their position with respect to the ambiguity issue, and asserting that no question of ambiguity in title documents was presented. [Pet. at 29, 30.] As noted above, petitioners had consistently urged the ambiguity of the 1962 ratification agreement, in Montana District Court, in the Montana Supreme Court, and in Federal Courts to this level.

The Court of Appeals' award of attorney fees and costs fits squarely within the scope of Rule 38, Federal Rules of Appellate Procedure. As the Advisory Committee on Appellate Rules noted:

> [C]ourts of appeals quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous . . . as a matter of justice to the appellee and as a penalty against the appellant.

This is an appropriate case for the sanctions that have been imposed. Supreme Court Rule 42.2 authorizes further sanctions and, in light of petitioners' failure to substantiate their request that this Court grant certiorari, sanctions should be imposed here as well.

CONCLUSION

This case does not raise an issue that has not been decided by this Court. The Montana judges respectfully request that the Court decline to exercise its discretion and deny the Petition.

Respectfully submitted,

Allen B. Chronister
Counsel of Record
208 North Montana Avenue
Helena, MT 59601
(406) 449-3691